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MICHAEL RODAK, JR., CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 78-1791

FIRST NATIONAL BANK OF COMMERCE,
Petitioner,

vs.

DIMITRI T. SKOURAS, as TRUSTEE OF
THE NORTH PLAZA TRUST,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the California Court of Appeal
Second Appellate District

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PETITION FOR A WRIT OF CERTIORARI
to the California Court of Appeal
Second Appellate District

The petitioner First National Bank of Commerce respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Second Appellate District, entered in this proceeding on March 5, 1979.

OPINION BELOW

Neither the California Court of Appeal nor the California Supreme Court issued an opinion.

JURISDICTION

The order of the California Court of Appeal, Second Appellate District, denying the Petition for Writ of Man-

date was entered on March 5, 1979. The Supreme Court of California denied a petition for hearing on April 12, 1979. The order is thus a final judgment reviewable by writ of certiorari. *Mercantile Nat. Bank v. Langdeau,* 371 U.S. 555, 558, 9 L.Ed.2d 523 (1963). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

May a national bank be found to have waived the provisions of 12 U.S.C. Section 94 merely by doing business in a state or must plaintiff show that the bank voluntarily and intentionally waived the protection of the statute?

STATUTORY PROVISIONS INVOLVED

United States Code, Title 12:

§ 94. VENUE OF SUITS:

> Actions and proceedings against any association under this chapter may be had in any district or territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.

STATEMENT OF THE CASE

Petitioner First National Bank of Commerce (FNB) is a national bank located in Louisiana with no branches in any other state. FNB has never sought the aid of the California courts and has not regularly conducted business in that state other than as is incident to the normal workings of the national banking system.[1]

[1]For example, FNB sometimes participates in loans made by California banks, and has a correspondent relationship with the Bank of America.

In 1973, FNB purchased forty-nine percent of the shares of a California investment corporation called First Southern Capital Corporation (First Southern). Thereafter, the corporation operated from Louisiana and neither maintained a California office nor made California investments. It owns no California real property and has no employees in that state. Neither the purchase of the First Southern stock by FNB nor the operation of that corporation while FNB owned that stock is in dispute in this or any other action.

Four years later, in 1977, FNB sold all of its shares of First Southern to Crabtree Investments, Inc. (Crabtree), a Louisiana corporation. All negotiations for, and the execution of, that sale were conducted in Louisiana. Six months after the sale was consummated, Crabtree reduced the First Southern Board of Directors from twelve members to six.

Dimitri Skouras then filed an action in the California Superior Court in Los Angeles on August 10, 1978, alleging that FNB received a "premium" in the sale of its First Southern stock, and that Crabtree had improperly reduced the number of directors.

Neither FNB nor Crabtree have offices, branches or employees in the state of California, and all of the challenged transactions and events in the underlying action occurred in Louisiana. Thus, all of the percipient witnesses and relevant documents in the underlying action are in Louisiana, across the country from where plaintiff Skouras seeks to bring his action.

FNB did not make a general appearance in the Skouras action but moved to quash the service of summons upon it

on the ground that Section 94 prohibited bringing the suit in California. The trial court, acting through a commissioner, denied the motion on February 6, 1979. California Code of Civil Procedure Section 418.10(c) expressly provides for review of such orders by writ of mandate, and FNB timely filed a petition for a writ of mandate on February 26, 1979. By order dated March 5, 1979, the California Court of Appeal, Second Appellate District, denied that petition. The California Supreme Court denied a petition for hearing on April 12, 1979.

REASONS FOR GRANTING THE WRIT

1. The California Courts' Interpretation Of The Waiver Exception To Section 94 Effectively Repeals The Statute And Is Contrary To Both Analogous Decisions Of This Court And To Direct Holdings Of The Circuit Courts of Appeals

Although the command of Section 94 that national banks may be sued only where they are located is mandatory and binding on all state courts,[2] the statute, and the congressional intent behind it, have been avoided by some California courts through the device of expanding an implied waiver exception to defeat the statutory mandate.

In 1889, this Court decided that a national bank could waive the protection of what is now Section 94 by failing to assert it until the appeal after losing a trial on the merits. *First National Bank of Charlotte, North Carolina v. Morgan,* 132 U.S. 141, 33 L.Ed. 282 (1889). This Court

[2]*Mercantile Nat. Bank v. Langdeau,* 371 U.S. 555, 9 L.Ed. 2d 523 (1963).

has never delineated the bounds of that doctrine, however,[3] and that guidance is now sorely needed.

The California courts have decided that if a national bank is doing business in California, it has waived the protection of Section 94. *See, Levine v. Second Nat. Bk. of Danville,* 63 Cal.App. 3d 258, 133 Cal.Rptr. 697 (1976); *Michigan Nat. Bank v. Superior Court,* 23 Cal.App. 3d 1, 99 Cal. Rptr. 823 (1972).[4]

That test, however, would subject national banks to suit in almost every state solely on the incidents of national banking, thus defeating the purpose of the statute and rendering it meaningless. For this reason, the Court specifically rejected an analogous interpretation of Section 94 in *Mercantile Nat. Bank v. Langdeau,* 371 U.S. 555, 560, 9 L.Ed.2d 523 (1963):

> Appellee, however, would have us hold that any state court could entertain suit against a national bank as long as state jurisdictional and venue requirements were otherwise satisfied. Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suit to be brought in the bank's home county. This we are unwilling to do, particularly in light of the history of § 57.

The same result should follow here. Indeed, a "doing business" test has specifically been rejected by several

[3]In *Michigan Nat. Bank v. Robertson,* 372 U.S. 591, 9 L.Ed.2d 961 (1963) and *National Bank v. Associates of Obstetrics,* 425 U.S. 460, 48 L.Ed.2d 92 (1976), the Court declined to consider what conduct would be sufficient for waiver because the issue had not been decided below. *See also, The Chase Manhattan Bank v. Sailboat Apartment Corp.,* 429 U.S. 911, 50 L.Ed.2d 278 (1976).

[4]In effect, these courts hold that if the minimum contacts due process test for *in personam* jurisdiction is met, the bank has "waived" the protection of Section 94.

courts of appeals in decisions which were ignored by the California courts in the instant case. *E.g., Northside Iron & Metal Co., Inc., v. Dobson & Johnson, Inc.,* 480 F.2d 798, 800 (5th Cir. 1973); *Helco, Inc. v. First National City Bank,* 470 F.2d 883, 885 (3rd Cir. 1972).

The present situation closely parallels the earlier conflict over whether Section 94 is mandatory or permissive which was resolved in *Mercantile Nat. Bank v. Langdeau, supra,* 371 U.S. 555. All of the federal courts which had considered that question held that Section 94 is mandatory, while the state courts split on the issue. *Id.* at 562 n. 13. The same concerns that caused this Court to resolve the prior conflict also compel consideration of the issue presented here; the problem is identical except that instead of avoiding the statute by finding it "permissive," state courts are now finding that it was "waived."

Unless this Court resolves the question, Section 94 will be upheld or avoided solely on the accident of whether a federal or state court entertains the suit. If the suit is in a federal court, Section 94 is given effect and waiver is not found in the absence of a voluntary and intentional relinquishment of the right. In the state courts, however, the mandate of Section 94 is sometimes disregarded on the pretext of waiver. The enforcement of federal rights should not turn on whether the question is presented in a state court or a federal court. *Cf., Guaranty Trust Co. v. York,* 326 U.S. 99, 112, 89 L.Ed. 2079 (1945). This Court was given the power to settle such questions precisely to avoid this problem. *See, Lego v. Twomey,* 404 U.S. 478-479 n. 1, 30 L.Ed.2d 618 (1972). The exercise of that power is needed here.

2. A Waiver Of Section 94 Can Only Occur If There Is A Voluntary And Intentional Relinquishment Or Abandonment Of The Privilege

The command of Section 94 that national banks may only be sued where they are located is "mandatory" and "exclusive." *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 152, 48 L.Ed.2d 540 (1976); *Mercantile Nat. Bank v. Langdeau, supra,* 371 U.S. at 560. "Congress intended that in those courts alone could a national bank be sued against its will." *Citizens & Southern Nat. Bank v. Bougas,* 434 U.S. 35, 41, 54 L.Ed.2d 218 (1977) (quoting *Mercantile Nat. Bank v. Langdeau, supra,* 371 U.S. at 560).

Accordingly, the statute has "generally been construed narrowly and strictly." *Bechtel v. Liberty Nat. Bank,* 534 F.2d 1335, 1339 (9th Cir. 1976). As Justice Frankfurter noted in *Olberding v. Illinois Central R. Co.,* 346 U.S. 338, 341, 98 L.Ed. 39 (1953) (concerning 28 U.S.C. § 1391(a)):

> The requirement of venue is specific and unambiguous; it is not one of 'hose vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction.

An implied waiver of Section 94 should therefore not lightly be inferred:

> If proof of a waiver rests on one's acts, 'his act[s] . . . should be manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible.' [Citation.]
>
> *Bechtel v. Liberty Nat. Bank, supra,* 534 F.2d at 1340.

Where the bank makes a general appearance and, after losing a trial on the merits, objects to venue for the first time on appeal, or where the bank itself brings suit in a foreign jurisdiction, provoking a counterclaim, the waiver standard is easily met. However, where the bank is merely doing some business in the state, but has no branches, offices or employees there, it cannot reasonably be said that the bank has intended to relinquish its right to be sued only where it is located.

This Court should adopt the standard espoused by the Third, Fifth, Seventh, Eighth and Ninth Circuits[5] that waiver of Section 94 requires a voluntary and intentional relinquishment that may not be implied merely by doing business in the state, but may only be found by conduct clearly manifesting an intent to waive the privilege.

In the instant case, that standard cannot be met. FNB has no branches, offices or employees in California and raised the venue objection by special appearance rather than making a general appearance in the underlying case. Moreover, FNB has not employed the courts of California to file complaints or cross-complaints.

The only connection the underlying case has to California is that FNB purchased stock in a California corporation. Just as driving through a state does not waive venue

[5]*Bechtel v. Liberty Nat. Bank, supra,* 534 F.2d 1335; *Northside Iron & Metal Co. v. Dobson & Johnson, Inc., supra,* 480 F.2d 798; *Helco, Inc. v. First National City Bank, supra,* 470 F.2d 883; *Buffum v. Chase Nat. Bank of City of New York,* 192 F.2d 58 (7th Cir. 1951); *Fisher v. First National Bank of Omaha,* 338 F.Supp. 525 (S.D. Iowa), *appeal dismissed,* 466 F.2d 511 (8th Cir. 1972). *See, Klein v. Bower,* 421 F.2d 338 (2d Cir. 1970).

rights,[6] purchasing stock in a corporation which happens to be incorporated in another state does not manifest a knowing and voluntary relinquishment of the right of a national bank to be sued where it is located.

Requiring FNB to defend the Skouras action in California also violates basic concepts of fairness and justice. All percipient witnesses and relevant documents are in Louisiana, and Crabtree can only be sued in Louisiana.[7] Only the plaintiff's attorneys reside in the attempted forum of the underlying lawsuit; plaintiff Skouras resides in Napa, California, which is several hundred miles from Los Angeles. There is, therefore, no valid reason to maintain this action in Los Angeles, and that forum imposes a considerable hardship on FNB which is located across the country in New Orleans.

It is important to note that not only must FNB's records be transported to Los Angeles County in order for the bank to defend itself, but its employees and officers would be required to travel there also, further disrupting the bank's business. Moreover, since California cannot compel the attendance at trial of Louisiana residents, much of the evidence may have to be introduced by deposition excerpts rather than live testimony. To defend itself where it has no branch office, no business relationship or any other contact and, indeed, where the only contact is the residence of plaintiff's attorneys, not only places an undue and unfair burden on the bank, but threatens basic concepts of justice.

[6]*Olberding v. Illinois Central R. Co.,* 346 U.S. 338, 98 L.Ed. 39 (1953).

[7]Crabtree's motion to quash the summons served upon it in the underlying action is pending in the Los Angeles superior court.

See, Kulko v. California Superior Court, 436 U.S. 84, 56 L.Ed.2d 132, 144-145 (1978).

The inconvenience and hardship of litigation in a distant forum such as Los Angeles is precisely the reason that Congress enacted Section 94. This Court should not permit that congressional intent to be thwarted.

CONCLUSION

Despite the mandatory provisions of Section 94 of the National Bank Act, providing that national banks may only be sued in the county where they are located, and despite the undisputed fact that FNB is a national bank not located in California, the California courts have refused to enforce that statute and to quash service of the summons on the bank.

We respectfully submit that not only were these rulings plainly erroneous and place an unwarranted burden on the bank by forcing litigation in California, when the only percipient witnesses and relevant documents are in Louisiana where all the transactions in question occurred, but they pose a threat to the orderly functioning of government.

The recognition of federal rights cannot be permitted to rest on the happenstance of whether a federal or a state court is asked to enforce the statute. Yet California has refused to follow the clear federal authority on the conduct required for a waiver of the provisions of Section 94 and has instead expanded the waiver exception to swallow the statute.

Only this Court can provide the required parameters of the waiver rule, and only this Court can bring conflicting

federal and state authorities into line so that the federal statute in question has the same meaning in every state and in every court.

The Court is respectfully requested to grant this Petition for a Writ of Certiorari, to establish the limits of the waiver doctrine, and to rectify the injustice that was done in this case.

Dated: May 18, 1979.

Respectfully submitted,

JAY R. MARTIN
PETER W. DAVIS
CROSBY, HEAFEY, ROACH & MAY
PROFESSIONAL CORPORATION

By PETER W. DAVIS
Counsel for Petitioner

(Appendices Follow)

Appendices

Appendix A

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

APR 12 1979

I have this day filed Order .....

HEARING DENIED

In re: 2 Civ No. 55516

First Natl Bank
vs.
Sup Ct

Respectfully,

G. E. BISHEL
Clerk

Appendix B

Superior Court of California,
County of Los Angeles
Dept. 66

Date	February 6, 1979
	Judge
Honorable Arnold Levin	Judge Pro Tem
None	Deputy Sheriff
P. Pappas	Deputy Clerk
None	Reporter

C 250885
Dimitri T. Skouras, etc.

vs.

First National Bank of Commerce,
a national bank, etc., et al.,

Counsel for Plaintiff
Munger, Tolles & Rickershauser

Counsel for Defendant
Jay R. Martin
Eric G. Wallis
Crosby, Heafey, Roach & May
Michael Q. Eagan

Nature of Proceedings.

Motion of defendant First National Bank of Commerce to quash service of summons and to dismiss complaint

(Submitted Matter)

In this matter, heretofore taken under submission February 2, 1979, the Court renders its decision as follows:

Motion DENIED.

Counsel for plaintiff to give notice.

On the Court's own motion, the time for seeking a writ pursuant to C.C.P. Section 418.10(c) is extended to 20 days from the date of this order.

Copy of this minute order is sent this date by U.S. Mail to counsel for the respective parties.

Minutes entered 2/6/79—County Clerk

Appendix C

In the Court of Appeal
of the
State of California

Second Appellate District

Division Three

2d Civil No. 55516
(Super. Ct. No. C250885)

First National Bank of Commerce,
a national bank,
Petitioner,

vs.

The Superior Court of California,
County of Los Angeles,
Respondent,

Dimitri T. Skouras,
Real Party in Interest.

[Filed Mar. 5, 1979]

ORDER

THE COURT:

The petition for writ of mandate, filed herein on February 26, 1979, has been read and considered. The petition is denied for failure to state facts sufficient to justify the relief sought.

Supreme Court, U. S.
FILED
AUG 22 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1791

FIRST NATIONAL BANK OF COMMERCE,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES,
(DIMITRI T. SKOURAS, ETC., Real Party in Interest)
Respondent.

BRIEF IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1791

FIRST NATIONAL BANK OF COMMERCE,
Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES,
(DIMITRI T. SKOURAS, ETC., Real Party in Interest)
Respondent.

BRIEF IN OPPOSITION

The Respondent Dimitri T. Skouras respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Order of the California Court of Appeal, Second Appellate District, entered in this proceeding on March 5, 1979.

QUESTION PRESENTED

Did the California Court of Appeal err in determining that Petitioner, a national bank, had waived the provisions of 12 U.S.C. Section 94, where (a) Petitioner's motion to quash service of process based upon 12 U.S.C. § 94 was untimely under state law, and (b) Petitioner had engaged in tortious conduct within and with respect to the State of California in its capacity as the controlling shareholder of a California corporation.

STATEMENT OF THE CASE

Certain matters highly germane to this case are not to be found in Petitioner's Statement of The Case. Accordingly, Respondent submits the following as his Statement of The Case.

First Southern Capital Corporation, formerly California Growth Capital, Inc. (hereinafter collectively referred to as "FSCC") is a Small Business Investment Company organized and existing under the laws of the State of California. Respondent Dimitri T. Skouras ("Skouras"), a California resident, is the trustee of a California trust which holds a minority of the shares of FSCC.

Petitioner First National Bank of Commerce ("FNB") is a nationally chartered bank with its headquarters in Louisiana.

In about 1971, FNB became interested in acquiring an interest in FSCC. In February of that year, two FNB representatives flew to Los Angeles to negotiate with FSCC. Two years of negotiations ensued, during which time representatives of FNB made numerous trips to California. In addition, FNB sent its appraiser to California to examine and appraise the assets of FSCC.

The closing of the Purchase and Sale Agreement pursuant to which FNB acquired its controlling shares of FSCC took place at FSCC's principal office located in Los Angeles, California, on March 30, 1973. The Bank was represented at the closing by its Executive Vice-President and two other employees. Pursuant to, and in connection with, the Purchase and Sale Agreement, an entity named De Anza Land and Leisure Corporation and FNB entered into a Security Agreement under which FNB received a security interest in two parcels of real property located within the State of California.

In 1977, FNB sold its controlling interest in FSCC to an entity named Crabtree Investments, Inc., for a premium above the market price and book value of those holdings. In conjunction with this sale, the FSCC Board members controlled

by FNB resigned and were replaced by persons chosen by Crabtree Investments, Inc. Shortly thereafter, the size of the Board of FSCC was reduced so that Skouras no longer has sufficient votes to elect any members of the Board.

On August 10, 1978, Skouras filed a lawsuit in the California Superior Court, County of Los Angeles, against FNB and others. The Complaint alleged, *inter alia,* that FNB had breached its fiduciary duty as controlling shareholder by: (1) not sharing with Skouras and other minority shareholders the premium it received for the sale of control and for director resignations; and (2) selling control to an entity it should have known would reduce the size of the Board of FSCC so as to preclude Skouras from electing anyone to that Board.

Pursuant to a written agreement between counsel, FNB was given an extension of its time to respond to the Complaint to October 16, 1978. FNB did not respond within this time period, however, but instead filed an untimely response on October 19, 1978, at which time it filed a motion to quash service of process on the ground that, under 12 U.S.C. § 94, it could be sued only in Louisiana.

Skouras opposed the motion on the ground that FNB had waived the provisions of 12 U.S.C. § 94 in two separate and independent respects. First, he argued that FNB waived the protection of 12 U.S.C. § 94 by virtue of its extensive and tortious conduct within and with respect to the State of California in connection with its interest in FSCC. Second, Skouras contended that FNB waived the protection of 12 U.S.C. § 94 by failing to invoke that statute before its time to respond to the Complaint had expired, as required by California law.

The Superior Court denied FNB's motion by Order dated February 6, 1979. FNB thereupon filed a Petition for a Writ of Mandate, which Petition was denied by the California Court of Appeal, Second Appellate District, by Order dated March 5, 1979. The California Supreme Court denied a Petition for Hearing on April 12, 1979.

REASONS FOR DENYING THE WRIT

1. The Decision Below Rests On Adequate State Grounds

Petitioner purported to assert the provisions of 12 U.S.C. § 94 by filing a motion to quash service of process pursuant to *California Code of Civil Procedure* § 418.10. Section 418.10 provides that a defendant may make a motion to quash service "on or before the last day of his time to plead or within such further time as the court may for good cause allow. . . ." Petitioner's motion was untimely, as it was filed after its time to respond to the Complaint had expired. No extension of time was requested of the court and none was granted.

Respondent argued in the courts below that Petitioner's motion should be denied because it was untimely. By failing to assert the provisions of 12 U.S.C. § 94 within the time allowed by California law, Petitioner had waived those provisions.

As the Court of Appeal wrote no opinion, the decision below does not indicate whether or not it was based on this ground. For present purposes, then, it must be assumed that it was. *Durley v. Mayo,* 351 U.S. 277, 100 L.Ed. 1178 (1956); *Lynch v. People of New York,* 293 U.S. 52, 79 L.Ed. 191 (1934).

Furthermore, this nonfederal ground is adequate to sustain the denial of Petitioner's claim. The time requirement is expressly set forth in the procedural statute under which Petitioner made its motion, and is reasonable on its face. This Court has already held that 12 U.S.C. § 94 may be waived by untimely assertion, *First National Bank v. Morgan,* 132 U.S. 141, 33 L.Ed. 282 (1889), and that, in general, venue provisions are deemed waived if not asserted within the time alloted to plead. *Commercial Casualty Insurance Co. v. Consolidated Stone Co.,* 278 U.S. 177, 179-80, 73 L.Ed. 252 (1929).

Since the state court's decision can be sustained on the basis of an adequate nonfederal ground, the present Petition should be denied.

2. None Of The Factors Justifying The Exercise Of Certiorari Jurisdiction Is Present In This Case.

In several recent decisions, this Court has indicated that 12 U.S.C. § 94 may be waived by conduct, and has remanded to the state court for a determination of the waiver issue. *See National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.,* 425 U.S. 460, 48 L.Ed.2d 92 (1976); *Michigan National Bank v. Robertson,* 372 U.S. 591, 9 L.Ed.2d 961 (1963).

In this case, the state court, if it addressed the question at all, merely held that Petitioner's conduct within and with respect to the State of California, *in its capacity as a controlling shareholder of a California corporation,* gave rise to such a waiver.

This is not a holding on an important question of law, but rather, a resolution of a factual issue. Moreover, this factual issue is unlikely to recur, since the Petitioner was acting not in its capacity as a bank but instead in its capacity as the controlling shareholder of a corporation.

Petitioner suggests that the court below held that Petitioner had waived the protection of section 94 simply by doing business in California. It is clear that the court below held no such thing. Respondent never contended that Petitioner's participation in the national banking system was enough to constitute a waiver of section 94. Moreover, such a contention would have been futile, since the lower court had before it a recent decision by the California Court of Appeal in another case *sustaining* a claim by this very Petitioner under section 94. *See Kaiser Aetna v. Deal,* 86 C.A.3d 896, 899, 150 Cal.Rptr. 615 (1978). Clearly, then, the court below did not rest its decision on Petitioner's participation in the national banking system, but rather on the unique facts of this case.

Similarly unfounded is Petitioner's suggestion that this case is but one example of recent California decisions which have equated doing business with a waiver of section 94. For instance, in *Michigan National Bank v. Superior Court,* 23 C.A.3d 1, 99 Cal.Rptr. 823 (1972), cited by Petitioner, the Court of Appeal analyzed personal jurisdiction and waiver of section 94 as two distinct issues. The court rejected the contention that section 94 was waived solely because defendant had conducted enough business in California to be deemed to have appointed the Secretary of State as its agent for service of process.

Moreover, there is no conflict between the decision below and the decisions of the Circuit Courts of Appeals. None of the federal cases cited by Petitioner involved a claim that a national bank had breached a fiduciary duty as a controlling shareholder of a corporation. Rather, they involved banking activity. *See, e.g., Northside Iron and Metal Co. v. Dobson and Johnson, Inc.,* 480 F.2d 798 (5th Cir. 1973) (dispute concerning construction financing).

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a Writ of Certiorari.

Dated: August 23, 1979.

Respectfully submitted,

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(DIMITRI T. SKOURAS, etc., Real Party in Interest),
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I

PRELIMINARY STATEMENT

In his Brief in Opposition, Skouras raises two new issues which he contends are dispositive of this petition. First, he argues that Petitioner's one-day delay in moving to quash the summons issued on it constitutes a substantial and independent state ground sufficient to deprive this Court of jurisdiction to review the judgment entered below. This argument, however, misstates both the law of this Court and of California.

Skouras next contends that Petitioner's status as a selling controlling shareholder of a California corporation is by itself sufficient to constitute a waiver of Section 94 of the National Bank Act. However, he articulates no waiver standard by which the bank's conduct is to be measured. Instead, his argument, like the California court decisions at issue, simply assumes that if there is a sufficient basis for in personam jurisdiction, Section 94 has been waived. The issue presented here is what standard should be applied in cases where it is claimed that Section 94 has been waived. Skouras' argument merely illustrates the need for this Court to address that issue.

II
LEGAL ANALYSIS

A. No Substantial Or Sufficient State Ground Precludes Review Of The Judgment Below By This Court

Skouras argues that Petitioner's service of its motion to quash on October 17 rather than on October 16, 1978, constitutes a waiver under California law of Petitioner's right to assert Section 94 as a bar to the underlying action. He then leaps to the conclusion that the court of appeal so ruled and that this constitutes a sufficient and substantial state ground sufficient to support the judgment below thus depriving this Court of jurisdiction to review that judgment. It is clear, however, that Skouras has not only misconstrued the law of this Court, but has misstated the law of California.

"Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a non-federal ground, this Court will not take jurisdiction to review the judgment." *Stembridge v. Georgia,* 343 U.S. 541, 547, 96 L.Ed. 1130 (1952). Where, however, the purported state ground is not "substantial or sufficient," it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." *Durley v. Mayo,* 351 U.S. 277, 281-282, 100 L.Ed. 1178 (1956), quoting *Klinger v. Missouri,* 80 U.S. (13 Wall.) 257, 263, 20 L.Ed. 635 (1872). Skouras' argument is therefore meritless if Petitioner's one-day delay in serving its motion is not a "sufficient and substantial" state ground for upholding the judgment below. Under California law, it is not.

Respondent cites no California authority for his proposition and, in fact, California law is completely to the contrary. California courts have consistently held that a delay of several days in serving a motion to quash the summons is not, by itself, sufficient to deprive a litigant of the right to object to improper venue.

For example, in *Wrenne v. Huchting,* 51 Cal.App. 218, 196 P. 295 (1921), the defendant had served a notice of hearing, a demurrer and a motion to change venue the day after his time within which to respond to the complaint had expired, just as in the instant case. The California trial court denied the motion to change venue because of late service of the moving papers. The California court of appeal reversed the trial court's order, holding that the one-day lapse "was no justification for the [lower] court's action," and constituted an abuse of the trial court's discretion. *Id.* at 219. Similarly, in *Bank of Haywards v. Kenyon,* 32 Cal. App. 635, 637, 163 P. 869 (1917), the court of appeal held

that it was an abuse of the trial court's discretion to strike an answer which had been filed one day late and enter a default judgment against the defendant.

The California courts have also consistently declined to dismiss petitions for writs of mandamus seeking to overturn trial court rulings refusing to quash summons for lack of jurisdiction simply because the petition was untimely filed by a matter of a few days. *E.g., Quattrone v. Superior Court,* 44 Cal.App.3d 296, 301, 118 Cal.Rptr. 548 (1975); *Cornell University Medical College v. Superior Court,* 38 Cal.App.3d 311, 315, 113 Cal.Rptr. 291 (1974).[1]

In light of this authority, which was cited to the California courts by Petitioner and not contradicted by Skouras, it cannot be said that the decision below was based on the procedural ground of a one-day delay in serving the motion to quash the summons. As a matter of law, that delay could not preclude Petitioner from asserting Section 94. Skouras' argument is therefore untenable and will not defeat the jurisdiction of this Court. *Enterprise Irrigation District v. Farmers Mutual Canal Company,* 243 U.S. 157, 164, 61 L.Ed. 644 (1917).

Moreover, a state procedural rule which is discretionary rather than mandatory, and thus not consistently applied, does not bar review by this Court. *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229, 233-234, 24 L.Ed.2d 386 (1969); *Barr v. Columbia,* 378 U.S. 146, 149, 12 L.Ed.2d 766 (1964).

[1]Indeed, the Section 94 defense need not even be raised by a bank in its initial appearance. *E.g., Beal v. Third National Bank,* 350 So.2d 840, 841 (Fla.App. 1977). If the California courts did act on the basis suggested by Skouras, certiorari would be equally necessary to prevent inconsistent results among the states.

Therefore even if the petition for writ of mandamus was denied on the grounds of late service of papers in the trial court, such a decision could not be other than the discretionary application of a procedural rule which would not bar review by this Court.

Skouras cannot avoid the issue presented by a procedural smokescreen. Clearly, the California courts found against Petitioner on the federal ground at issue: alleged waiver of Section 94. That decision is, of course, subject to review by this Court.[2]

B. Certiorari Is Necessary To Establish Definitive Guidelines For Determining Whether A Waiver Of Section 94 Has Occurred

Skouras argues that a waiver of Section 94 may be found merely because of Petitioner's status as a selling controlling shareholder of a California corporation. The attempted justification for this position is his further contention that in selling the shares of the investment corporation,[3] Petitioner "was acting not in its capacity as a bank" but as a business. Skouras seeks to distinguish between the various activities engaged in by banks, and have

[2]Neither of the cases cited by Respondent, *First National Bank of Charlotte, North Carolina v. Morgan,* 132 U.S. 141, 33 L.Ed. 282 (1889), and *Commercial Casualty Ins. Co. v. Consolidated S. Co.,* 278 U.S. 177, 73 L.Ed. 252 (1929), are on point since both involved situations where Section 94 was raised for the first time after a judgment on the merits had been entered by the trial court. *See, DeDond v. Pullman Co.,* 53 F.2d 94 (E.D.N.Y. 1931).

[3]Skouras does not contest that all of the activities relating to the sale by Petitioner of the investment corporation's stock transpired in Louisiana rather than in California. The purchase of the stock three years earlier is irrelevant as that transaction is not in dispute.

California courts hold that "banking" activities are entitled to the protection of Section 94 but "business" activities are not.

Preliminarily, it should be noted that Skouras' exceedingly myopic view of the business of banking has no basis in fact. Banks do not just accept deposits and make loans. *Melton v. Unterreiner*, 575 F.2d 204, 207 n. 4 (8th Cir. 1978). Rather, one of the major premises of the banking business is investment of deposits to achieve a return in excess of what must be paid to the depositor. Bank trust departments are also required to make substantial investments in securities. *See generally*, Hunsicker, *Conflicts of Interest, Economic Distortions, And The Separation Of Trust And Commercial Banking Functions*, 50 So. Calif. L.Rev. 611, 666 (1977); Greenspan, *Bank Holding Companies: Competition, Capital, and Banking Acquisitions*, 90 Banking L.J. 560, 575-577 (1973). Petitioner's sale of shares in an *investment* corporation is therefore as much a part of the banking business as is making loans. Indeed, 15 U.S.C. Section 672(b) explicitly authorizes a bank to acquire shares of small business investment corporations like First Southern as part of its normal banking activity.

Moreover, Section 94 does not discriminate among a national bank's activities. It does not provide that a national bank may only be sued in the county where it is established, except where the subject of the suit is investments. Rather, it contains an absolute and unqualified prohibition against suit in other jurisdictions. *E.g., Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 48 L.Ed.2d 540 (1976) (securities law violation alleged); *McClung v. LaSalle National Bank of Chicago, Illinois*, 387 F.Supp. 977, 979 (D. Iowa 1975) (securities law violation). Skouras' attempt to amend the statute to suit his purposes cannot succeed.

With respect to certiorari, however, Skouras' argument is very revealing. Significantly, he never discusses the proper framework for resolution of the waiver issues and is unable to suggest what standard California courts apply. The reason is clear: there is no waiver standard in California against which to measure conduct in a particular case, other than a "doing business" standard. By his "controlling shareholder" argument Skouras, like the California courts, simply assumes that if the bank is doing sufficient business in the state for in personam jurisdiction to attach, Section 94 has been waived.[4] The case relied on by Skouras for the contrary proposition,[5] *Michigan Nat. Bank v. Superior Court*, 23 Cal.App.3d 1, 99 Cal.Rptr. 823 (1972), is a striking illustration of this approach, holding:

> In this case it is concluded that the Michigan bank, by soliciting with its forms the refinancing of sales of

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[4]Actually, even that test is not met here. In *Shaffer v. Heitner*, 433 U.S. 186, 214-16, 53 L.Ed.2d 683 (1977), this Court held that an officer or director of a Delaware corporation who was not a resident of that state could not be sued in Delaware when the activities which allegedly caused injury to the corporation took place in another state. That reasoning forecloses Skouras' contention that Petitioner's status as a corporate shareholder constitutes submission to the jurisdiction where the corporation was incorporated.

[5]Skouras also relies on *Kaiser Aetna v. Deal*, 86 Cal.App.3d 896, 899, 150 Cal.Rptr. 615 (1978), for his contention that the finding of waiver here was "business" rather than "banking" activities. Since waiver was not even an issue on appeal in that case, Skouras has misrepresented its holding.

> airplanes, sold and to be harbored in this state, is not only doing business in this state so as to be subject to the jurisdiction of the courts of this state in disputes involving such transactions, but has also waived the requirements of section 94 insofar as such suits are concerned. *Id.* at 13.

As noted in the petition in the instant case (pages 7-8), that formulation is clearly contrary to the standard adopted by the circuit courts of appeals.

III

CONCLUSION

A divergence of opinion clearly exists between the California courts of appeal and the circuit courts of appeals, over the parameters for establishing that a national bank has waived its venue rights under Section 94 of the National Bank Act. This divergence can only be rectified by an option of this Court.

The facts of the case at bar, involving a suit against a national bank far away from its place of establishment over a transaction no part of which occurred within the State of California, vividly illustrates the erosion by California courts of the congressionally-mandated Section 94 privilege accorded national banks. It is left to this Court to prevent that erosion and to establish clear standards for determina-